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No. 1072

In the Supreme Court of the United States

OCTOBER TERM, 1967

ALBERT H. HOLMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1967. A timely petition for rehearing was denied on January 2, 1968. The petition for a writ of ceritorari was filed on February 1, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a letter in petitioner's Selective Service file addressed by his local board to the hospital to which he was ordered to report for civilian work, and

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a notation thereon indicating that petitioner had not reported, were properly admitted into evidence.

2. Whether the operation of the civilian work program of the Selective Service System violates the Thirteenth Amendment.

3. Whether the civilian work program of the Selective Service System denies the equal protection of the laws to conscientious objectors.

STATEMENT

After a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of wilfully failing to report to his place of civilian employment as directed by his local board (50 U.S.C. App. 462). On April 18, 1967, he was sentenced to three years' imprisonment. The court of appeals affirmed, one judge dissenting.

The relevant evidence consisted of petitioner's Selective Service file, which was identified as a file kept in the ordinary course of business of petitioner's local board by John T. Seigle, Assistant Chief of the Field Division at the Illinois Selective Service Headquarters (Tr. 6, 12–15).[1] Seigle testified that the records of the local Selective Service boards in Illinois came under his control and supervision (Tr. 8, 15–16).

The Selective Service file showed that petitioner was classified I–O (conscientious objector) by his appeal board in August 1965 (B–33). Thereafter, he was

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which is on file with the Clerk of this Court. "B", followed by an appropriate number, will refer to the government's exhibits at trial, consisting of portions of petitioner's Selective Service file. The exhibits are likewise lodged with the Clerk of this Court.

ordered to report to his local board on February 21, 1966, to receive instructions to report for civilian work at the Elgin State Hospital in Illinois (Tr. 22). On the designated date, petitioner personally submitted a letter to the local board stating that, because of his "ministerial obligations", he could not accept the civilian work at Elgin State Hospital (B–59).[2] On the same day, the clerk of the local board sent a letter to the Elgin State Hospital (Pet. 6) stating that petitioner had informed the board that he would refuse to accept his assigned work and would not proceed to the hospital. The letter asked the hospital to "submit a statement to that effect" (B–61). This letter was received back at the local board on March 1, 1966.[3] A typewritten notation below the signature of the clerk stated:

> This office has no knowledge of the above-named ever appearing at this office for an interview.

ARGUMENT

1. Petitioner contends that the admission of the letter, or that part thereof indicating his failure to report for civilian employment as directed, violated his Sixth Amendment right to confrontation of witnesses. However, the letter was admissible as a record made in the regular course of business of the local board and the hospital. 28 U.S.C. 1732. The letter on its face revealed that it had been sent out by petitioner's local board to the hospital requesting con-

[2] Petitioner was apparently a member of the congregation of Jehovah's Witnesses.

[3] The letter indicates on its reverse side that it was received at the hospital on February 23, 1966.

firmation of petitioner's failure to report for civilian work; that the letter was received at the hospital; and that it was returned to the local board. As the court of appeals found (Pet. App. 3), it is evident that the hospital, "instead of sending a separate response to the inquiry of the Board, gave the information by the notation on the Board's original letter, that the hospital officials knew nothing of the defendant." It is apparent that it was within the regular course of business of the draft board to send out such a letter, and within the regular course of business of the hospital to reply.[4] See *LaPorte* v. *United States*, 300 F. 2d 878 (C.A. 9); *Pardo* v. *United States*, 369 F. 2d 922, 926 fn. 7 (C.A. 5); compare *Yaich* v. *United States*, 283 F. 2d 613 (C.A. 9); *United States* v. *Borisuk*, 206 F. 2d 338 (C.A. 3); *United States* v. *Ward*, 173 F. 2d 628 (C.A. 2). We note also that the Selective Service file, of which the letter was a part, was itself properly authenticated and admitted into evidence. See 32 C.F.R. 1606.35(a); *Pardo* v. *United States, supra;* cf., *Prohoroff* v. *United States*, 259 F. 2d 694 (C.A. 9), certiorari denied, 359 U.S. 907.

[4] Nothing in *Palmer* v. *Hoffman*, 318 U.S. 109, is to the contrary. That case held only that a written statement by a railroad employee to an official of the company investigating an accident in which the employee was involved, was not a record made in the company's ordinary course of business as a public carrier.

Nor is *Pointer* v. *Texas*, 380 U.S. 400, in point. In *Pointer*, the transcript of a preliminary hearing was deemed inadmissible because the defendant, who was without counsel at the time of the preliminary hearing, was unable then effectively to cross-examine the witnesses against him. Here there is no problem of lack of counsel with relation to the admissibility of evidence; the question in this case turns on the nature of the evidence itself.

2. There is no merit in petitioner's argument (Pet. 13) that the civilian work program of the Selective Service Sysem is unconstitutional in peacetime as a form of "involuntary servitude". The program (authorized under 50 U.S.C. App. 456(j)) is valid, under the "necessary and proper" clause of the Constitution, as incident to the power of Congress, under Article I, Section 8, to "raise and support armies." It is an alternative to compulsory military service and serves to preserve discipline and morale in the armed forces. *Badger* v. *United States,* 322 F. 2d 902 (C.A. 9), certiorari denied, 376 U.S. 914; *Howze* v. *United States,* 272 F. 2d 146 (C.A. 9). Even assuming that the present time is one of "peace", it has long been settled that the power to raise armies by conscription is not limited to periods of war or national emergency. *E.g., United States* v. *Henderson,* 180 F. 2d 711 (C.A. 7), certiorari denied, 339 U.S. 963; *Etcheverry* v. *United States,* 320 F. 2d 873 (C.A. 9), certiorari denied, 375 U.S. 930.

3. Petitioner's contention that the civilian work program denies to conscientious objectors the equal protection of the laws because those in other exempted or deferred categories do not have to serve is also unfounded. The system of classification is not irrational. The fact that those in all deferred or exempted categories, other than those with a physical disability, are *able* to perform civilian work clearly does not negate the existence of rational considerations for differentiating among those categories with regard to a requirement of civilian work in lieu of induction. Compare *Goesaert* v. *Cleary,* 335 U.S. 464; *McLaughlin* v. *Florida,* 379 U.S. 184, 190–191; *Loving* v. *Virginia*

388 U.S. 1, 8–9. For example, it would be unreasonable to require students or registrants deferred by reason of hardship to dependents to serve, since to do so would defeat the policy underlying their deferment. By contrast, there is no reason why a person "conscientiously opposed to participation in war in any form" cannot reasonably be made to perform work "contributing to the national health, safety, or interest" (50 U.S.C. App. 456(j)) as an alternative to his obligation to bear arms in support of his country. See *United States* v. *Macintosh*, 283 U.S. 605, 623.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968